UPREME COURT, U. S.

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IN THE

Supreme Court of The United States

October Term, 1968

No. 160

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

THE PIERCE GOVERNOR COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT, THE PIERCE GOVERNOR COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Question No. 1

Whether an employer who relocates his plant for economic reasons is required to agree to the union's demand that all employees be guaranteed transfer to the new location in order to satisfy his duty to bargain with the union concerning the effects of the move on employees?

Question No. 2

Whether an employer who relocates his plant for economic reasons is required to recognize the union at the new location where the employees at the old plant do not transfer, or desire to transfer, to the new location in sufficient numbers to constitute a majority for the union, and where the union does not claim to represent a majority of the employees hired to work at the new location?

Question No. 3

Whether an employer who relocates his plant for economic reasons is required to agree to the union's demand that employees who engaged in strike misconduct or whose work performance was unsatisfactory at the old location be guaranteed transfer to the new location?

STATEMENT OF THE CASE

The "Statement of the Case" in the Petition (pp. 3-11) does not contain all of the facts material to the consideration of the questions presented.

Facts*

Petitioner was certified in 1941 as the bargaining representative of production and maintenance employees at the Anderson, Indiana, plant of Respondent, The Pierce Governor Company, Inc. (herein the "Company"). Thereafter, the Company negotiated with Petitioner and its Local 940 (herein sometimes referred to together as the "Union") a series of collective bargaining agreements, the most recent of which was terminated by timely notice on October 30, 1964. (A. 24a)

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* This statement of facts is based for the most part on the findings of fact contained in the decision of the Labor Board. Unless otherwise indicated, all page references herein are to the Appendix to the Petition for a Writ of Certiorari.

The parties began bargaining in September, 1964, for a new agreement. In the absence of satisfactory progress, the Union initiated a strike on November 6. This strike was admittedly economic at its inception. (A. 24a) The parties continued negotiations at meetings on November 16 and 20, and December 2 and 8. At the meeting of December 16, the Company advised the Union that for economic reasons it was contemplating moving its plant to the community of Upland, Indiana, some 40 miles away.[1] The Company offered to bargain about the relative advantages or disadvantages of the move itself. The Company further added that should the move be made, each employee presenting himself at the new plant would be given full consideration for reemployment and, if hired, would retain his seniority. (A. 24a, 33a, 38a-39a) With respect to recognition of the Union as the bargaining representative of employees at Upland, the Company stated that recognition would be dependent upon proof of representation. (A. 24a) The Union responded by stating that it wished to bargain for an agreement on the operations of the Anderson plant so long as it remained at that location, and the effects on the Anderson employees of a transfer of the Company's operations to any other community. (A. 25a)

The parties met on December 22 and 31, 1964, and again discussed the subject of transfer. On both occasions the Union demanded from the Company a "guarantee' to transfer all Anderson employees. The Company refused to accede to this demand by the Union explaining that certain of the employees were physically unable to perform a full

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[1] At the hearing, the parties stipulated that the physical condition of the plant at Anderson, Indiana, had deteriorated to a point where its continued operation without proper repair and remodeling created unsafe and unhealthful working conditions. It is not disputed that the move was precipitated by legitimate economic reasons and was in no way due to anti-union motives. (A. 38a-39a)

day's work; others, although physically capable, had not been delivering a full day's work; and still others had disqualified themselves from employment because of objectionable conduct during the strike. The Company renewed its offer to consider Anderson applicants in light of their qualifications for employment, with the retention of seniority for those hired. At the meeting of December 31, the Company added to its proposal by the offer of severance pay to those employees not hired. (A. 25a-26a, 39a-40a)

At a meeting on January 21, 1965, the Company offered immediately to declare the Anderson plant closed in order to enable the employees to draw unemployment compensation. The Company also offered to go to the "Federal Unemployment Service" to try to secure other jobs for the Anderson employees under what is known as the "Studebaker System." The Company further offered to increase severance pay for Anderson employees who did not transfer by using for that purpose the surplus in the pension fund. (A. 27a)

At a bargaining meeting on January 26, the Union stated that because of the economic differences between the two areas "very few" of the Union employes would care to transfer to Upland, and that while the Union did not expect the Company to transfer all Anderson employees to Upland, it did insist that the Company bargain with respect to the suitability of each Anderson employee for employment at Upland. (A. 27a-28a)

By letter dated January 28 addressed to the Union, the Company agreed to bargain with the Union as to each employee on the Anderson seniority list for employment at Upland, taking into account their qualifications for the work, physical condition, mental outlook and attitude, absentee record, and job openings at Upland. In the absence of a reply from the Union concerning the points raised in its letter of January 28, the Company withdrew its offer

on March 9, concluding with the comment, "We cordially invite your suggestions or comments as to where we go from here." (A. 29a)

On June 15, 1965, at a meeting to discuss pensions, the Union declared that there were only about 75 employees still on the picket line at Anderson and that only about 50 percent of them would be interested in going to Upland. (A. 31a)

Toward the end of November, 1965, the parties again met to discuss the transfer of Anderson employees. The Union estimated that only 40 to 50 employees would be interested in transferring to Upland. The Union proposed that Anderson employees considered by the Company to be physically unable to perform their jobs be given a physical examination at a medical clinic and approved or disapproved for employment on the basis of the examination, and that employees whose physical capacities were not in question be given rights to jobs at Upland, bumping, if necessary, any employees newly hired at Upland. The Company countered by proposing that the parties use an independent arbitrator to determine through "objective standards" which employees would be offered jobs at Upland. After the meeting, the Union telephoned the Company to inform them that the Union could not agree to this proposal. (A. 32a-33a)

No further proposals on the transfer of Anderson employees were made by either party. (A. 33a)

The Upland plant became available for occupancy in April, 1965. Only one production employee from Anderson requested to transfer and he was employed. The Company then staffed the Upland plant with newly hired production and maintenance employees, the number increasing from 100 at the end of April, to 212 by the end of August, and at least 190 at all times since August, 1965. (A. 25a)

The Decision of the Trial Examiner

(A. 1a-22a)

The Trial Examiner held that the Company violated Section 8(a)(5) of the Act by continuously refusing to bargain with Local 940 as an integral part of the joint bargaining agent as to (1) the effects of the removal of the Company's plant from Anderson to Upland, Indiana, and (2) the terms and conditions of employment at the Upland plant. In addition, the Trial Examiner found that the economic strike, which began at Anderson on November 6, 1964, was prolonged by the Section 8(a)(5) conduct and was converted to an unfair labor practice strike. (A. 16a-17a)

The Decision of the Labor Board

(A. 23a-37a)

The Labor Board reversed the Trial Examiner and ordered the complaint dismissed in its entirety. The Board found on the basis of the Company's conduct during frequent meetings and correspondence with the Union that the Company met its obligation to bargain with the Union concerning the effects of the move to Upland on Anderson employees and their transfer to the new plant. The Board also found that the Company was under no duty to recognize the Union at Upland since it was clear from the record that at no time did employees from Anderson have an interest in transferring to Upland in numbers sufficient to preserve the Union's majority at Upland. Finally, the Board held that since the Company engaged in no conduct that violated the Act, the economic strike which began on November 6, 1964, was at no time converted into an unfair labor practice strike. (A. 35a-37a)

The Decision of the Court of Appeals

(A. 38a-48a)

The Court of Appeals for the District of Columbia

Circuit affirmed the Board's dismissal of the complaint. The court held that there was substantial evidence to support the Board's holding that the Company had met its obligation to bargain with the Union concerning the effects of the move to Upland on Anderson employees. As stated by the court: "The record is replete with proposals, counter-proposals and concessions by the Company." (A. 40a)

A majority of the court also held that the Company did not violate its bargaining duty by refusing to recognize the Union at the new location. It based this holding on two alternate grounds.

First, the majority held that where an international union has been certified as the exclusive representative of employees, an employer does not violate Section 8(a)(5) of the Act by failing to recognize an uncertified local as the representative of these employees. Even though the local participates jointly with the international in bargaining negotiations, the employer's duty to recognize runs solely to the certified international. Applying this rule, the court concluded that the Company had not violated the Act since the Company had never failed or refused to recognize the certified International at Upland, but only the uncertified Local 940. (A. 42a-43a) This ground had not been a basis for the Labor Board's decision.

Secondly, the court held that regardless of whether the Local was entitled to recognition at the old location, it was not at the new location, since the Union never established, or even claimed, that it ever represented a majority of the employees at Upland. (A. 45a-46a) This was the same ground on which the Labor Board based its decision.

The Dissenting Opinion
(A. 47a-48a)

Chief Judge Bazelon dissented on the issue of the Company's duty to recognize the Union at the new location. As

to the first ground advanced by the majority, he held that the fact that only the International was the certified representative did not exclude the Local. As to the second ground, he was of the view that if the Upland plant was merely a continuation of the Anderson operation, the move did not present an occasion for questioning the Union's majority status. Judge Bazelon would have remanded to the Board for reconsideration of the continuation question.

ARGUMENT

Question No. 1

Petitioner phrases its first question in terms of whether an employer who relocates his plant satisfies his duty to bargain concerning the transfer of employees to the new location "if he insists throughout that they must apply for reemployment at the new location on the same basis as all other applicants. . . ." (Pet., p. 2) Based on this factual premise, Petitioner argues that the decision of the court below is in conflict with the decision of the Second Circuit in *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684 (2d Cir. 1967). (Pet., pp. 11-13)

The factual premise (about quoted) upon which Petitioner bases its first question is not an accurate representation to this Court of the facts as found by the Board and accepted by the court below. First, at no time during bargaining on the transfer issue did the Company state or take the position that its Anderson employees were to be treated "on the same basis as all other applicants." Secondly, the Company did not "insist throughout" on its initial proposal as to employee transfers but substantially modified its position on several occasions during bargaining in an effort to reach agreement with the Union on this issue.

The Company made its original proposal on employee transfers to the Union on December 16, 1964—the first bar-

gaining session at which plant removal became an issue. The Company stated that "it would consider for transfer each Anderson employee who applied at the new plant, with seniority preserved for those hired." (A. 33a) On December 22, in response to the Union demand that the Company guarantee the transfer of all Anderson employees, the Company explained why this would not be feasible and listed three categories of employees which it felt were not qualified for employment at the new location. At a meeting on December 31, the Company modified its original proposal by the offer of severance pay to those employees who did not transfer to the new location.

On January 26, 1965, the Union acknowledged that it did not expect the Company to transfer all Anderson employees to Upland, but insisted that the Company bargain with respect to the suitability of each Anderson employee for employment at Upland. The Company promptly responded to this proposal by the Union, and three days later—by letter addressed to the Union—agreed to bargain as to each employee on the Anderson seniority list for employment at Upland. Six weeks later, having heard nothing from the Union, the Company withdrew its offer.

Several months later the Union proposed that employees whose physical capabilities were at issue be examined by a medical clinic with employment at the new location to be dependent on the results, and that all other employees be guaranteed transfer rights. The Company countered by proposing that the issue of employment at Upland of all employees it considered unqualified be submitted to an independent arbitrator for binding decision. This Company proposal was rejected by the Union.

The Board made detailed and extensive findings of fact and concluded on the basis of the Company's conduct during frequent meetings and correspondence with the Union, that the Company met its obligations to bargain concerning

the effects of the move to Upland on Anderson employees and their transfer to the new plant. As stated by the Board, "While the parties did not reach complete agreement on the transfer issue, the record shows that Respondent over a period of many months considered the Union's position, explained its own position, and made counter proposals as well as some concessions." (A. 35a)

The findings of the Board are, of course, to be upheld on review if such findings are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 492-97 (1951). Courts have also recognized that the evaluation of collective bargaining negotiations is one area in which the Board's expert experience and knowledge of bargaining problems is of particular importance and entitled to great weight. *Dallas General Drivers, Warehousemen and Helpers, Local 745 v. NLRB,* 355 F.2d 842, 844-845 (D.C. Cir. 1966).

The court below held that there was substantial evidence to support the Board's findings that the Company satisfied its duty to bargain concerning the effects of the relocation on Anderson employees. (A. 40a) This holding of the court is amply supported by the facts of the case. Petitioner's representation to this Court that the Company insisted throughout negotiations that Anderson employees must apply for reemployment at Upland on the same basis as all other applicants is not an accurate statement and is directly contrary to the findings of fact made by the Board.

Petitioner contends that the decision of the court below is in conflict with the holding of the Second Circuit in *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684 (2nd Cir. 1967). This contention is without merit. Petitioner confuses a rule of law with a result in a case. It is true that the result reached by the court below differed from the result reached by the Court of Appeals for the Second Circuit, but not because of an application of conflicting rules

of law but rather because of the application of the same rule of law to different factual situations.

In *Cooper*—a plant removal case—the company at the outset of negotiations took the position that it would not deal with the union on the issue of employee transfers but would deal only with the employees on an individual basis. Employees could file employment applications at the new location and would be treated the same as any new job applicant. There would be no carry over of seniority. The company never retreated from this position. The union's proposal was that all the employees be guaranteed transfer rights to the new location with the same wage rates and fringe benefits that were in effect at the old location. During negotiations the company refused to furnish information to the union concerning jobs that would be available at the new location, and then proceeded to deal individually with employees rather than through their bargaining representative. Based on a combination of these factors, the Board found a violation of Section 8(a)(5) in the company's refusal to bargain over the effects on its employees of the move.

In enforcing this portion of the Board's order, the Second Circuit made it quite clear that enforcement was not based on the company's refusal to *agree* to the union's demand of guaranteed transfer rights, but rather on the company's refusal to *discuss* the issue of employee transfers with the union.

> "[T]he Board may reasonably interpret § 8(a)(5), as explicated in § 8(d), as requiring an employer relocating his plant not merely to give reasonable notice to a recognized union and to negotiate the terms of the shutdown . . . but also to discuss with it the basis on which employees may transfer and, in that connection, to give information as to jobs in the new plant essential to the intelligent formulation of the union's requests. * * * While

> Cooper was not bound to agree to the Union's demand that the Pequabuck employees 'be taken' to Middlefield with everything unchanged or even to less burdensome proposals, the Board could properly fault it for an attitude which, in effect, ousted the Union from any role in negotiating what might be offered to employees desiring to transfer." 376 F.2d at 688 (A. 54a)

Petitioner's statement that "the facts of the two cases are virtually identical" is inaccurate. (Pet., p. 11) In *Cooper,* the company refused to discuss with the union the issue of employee transfers and, instead, insisted on dealing directly and individually with the employees themselves. These were the crucial factors from which the Board and the Second Circuit concluded that the company had failed to bargain with the union. Neither of these two crucial factors is present in the instant case. The Company was willing to and did discuss the issue of employee transfers with the Union during many bargaining meetings and substantially modified its original proposal in an effort to reach agreement with the Union. Furthermore, the Company never dealt individually with employees or attempted to oust the Union from a meaningful role in negotiations.

The decision of the Second Circuit in *Cooper* and the decision of the court below in the instant case both stand for the same legal proposition: An employer must bargain with the union over the effects of a plant removal on employees, including transfer rights of employees to the new location, but the employer is not obligated to agree to the union's demand of guaranteed transfer rights for all employees. The two courts applied the same legal principle, but a different result was reached by each because of different facts. There is no conflict between the Courts of Appeal for the Second Circuit and the District of Columbia Circuit on the questions herein involved.

Question No. 2

The Company refused to recognize the Union at the new plant until and unless it was able to demonstrate its majority there. The Board and the court below held that the Company's refusal to recognize the Union was not unlawful since it was clear from the record that at no time did employees desire to transfer to Upland in sufficient numbers to constitute a majority for the Union. (A. 36a, 45a-46a)[2]

The issue of whether a union's status as bargaining representative continues at the new location after a plant removal has been presented to the courts of appeal on several occasions. With but one exception, the courts have held that the union's status as bargaining representative does not carry over to the new location unless the evidence shows that employees have transferred to the new location in numbers sufficient to constitute a majority of the employ-

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[2] As an alternate ground for its holding on the recognition question, the court below ruled that the Company had not violated the Act because it had never refused to recognize the certified International at Upland, but only the uncertified Local 940. This ground had not been a basis for the Labor Board's decision. The Company does not intend to argue the validity of this ground. It is well settled that, in the review of judicial proceedings, a lower court's decision will be affirmed if any grounds relied on by the court are sufficient to justify its holding. *Helvering v. Gowran,* 302 U.S. 238, 245 (1937); *Nuttall v. Reading Co.,* 235 F.2d 546, 548 (3d Cir. 1956); *Amerada Petroleum Corp. v. Federal Power Com'n,* 285 F.2d 737, 738 (10th Cir. 1960); *Carrigan v. California State Legislature,* 263 F.2d 560, 565 (9th Cir. 1959), *cert. denied,* 359 U.S. 980. It is the Company's position that the "majority-status" ground relied on both by the Board and the court below—and discussed above—is sufficient to justify the holding that the Company did not violate the Act by refusing to recognize the Union at Upland.

ee complement at the new location.[3] *Local 57, ILGWU v. NLRB (Garwin Corp.)*, 374 F.2d 295 (D.C. Cir. 1967); *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684 (2d Cir. 1967); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *NLRB v. MacKneish*, 272 F.2d 184 (6th Cir. 1959).[4] This rule on recognition in plant removal cases is consistent with the general rule on recognition applied by the Board, and approved by this Court, to the effect that at any time after the certification year an employer may lawfully refuse to bargain with a union if he has fair doubts about the union's continued majority status. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

The reason for this holding is based on one of the Act's most basic policies—employee freedom to select a bargaining representative. If an employer is compelled to recognize and bargain with a union as bargaining representative of employees at the new location even though employees from the old location have not transferred in numbers sufficient to preserve the union's majority at the new location, then a bargaining representative has been imposed on the employees at the new location without reference to their choice. Such action violates one of the fundamental rights granted employees in Section 7 and Section 9(a) of the

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[3] The one exception is *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957). The court upheld a bargaining order based on the Board's findings that employees at the old location would have transferred to the new location in numbers sufficient to preserve the Union's majority had it not been for the company's unfair labor practices.

[4] *Compare NLRB v. Royal Oak Tool & Machine Co.*, 320 F.2d 77 (6th Cir. 1963) and *NLRB v. Hurley Co.*, 310 F.2d 158 (8th Cir. 1962), where bargaining orders were enforced on the basis of evidence showing that a majority of employees at the new location had transferred from the old location.

Act.[5] *Local 57, ILGWU v. NLRB (Garwin Corp.)*, 374 F.2d 295, 300-301 (D.C. Cir. 1967).

The bargaining units at Anderson and, ultimately, at Upland were of approximately the same size—200 employees. Only one Anderson employee in fact transferred to Upland, and the Union itself estimated that at best only 40 to 50 Anderson employees might be interested in transferring. (A. 45a-46a) Based on these undisputed facts and applying the rule on recognition in plant relocation cases, the Board and court below held the Company was within its rights in insisting that the Union demonstrate its majority status at Upland before according recognition.

Petitioner does not dispute that the holding by the Board and court below is in accord with the present rule on recognition in plant relocation cases. The contention by Petitioner is that this rule is in basic conflict with two other

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[5] Sec. 7, Labor Management Relations Act, 61 STAT. 140 (1947), 29 U.S.C. § 157:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *."

Sec. 9(a), Labor Management Relations Act, 61 STAT. 143 (1947), 29 U.S.C. § 159(a):

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

Labor Act doctrines dealing with change—the successorship and contract bar doctrines—and should therefore be overturned by this Court. (Pet., pp. 19-20) The Company agrees that the doctrines of successorship and contract bar are relevant; however, an examination of these doctrines shows that they are consistent with the holding in the instant case —and the general rule—on recognition in a plant relocation situation.

Under the successorship doctrine, a purchaser who continues the seller's enterprise along the same general lines and with the same employee work force is presumed to succeed to the seller's duty to recognize and bargain with the union. The reason for this doctrine is that it is logical to assume that since the same employees were employed both before and after the sale, the employees' choice of bargaining representative will remain the same. If, however, the successor employer has sufficient grounds to justify a reasonable doubt concerning the union's continued majority, the Board has consistently held that the successor may refuse recognition and demand that the union demonstrate its continued majority status. *Mitchell Standard Corp.*, 140 NLRB 496 (1963); *Diamond National Corp.*, 133 NLRB 268 (1961)

On page 20 of its Petition, Petitioner argues that in successorship cases the Board will require the successor to recognize the incumbent union even though there has been sufficient turnover so that the old employees do not constitute a majority after the change in ownership. Three cases are cited by Petitioner in support of this proposition: *Krantz Wire & Manufacturing Co.*, 97 NLRB 971, 987 (1952), *enf'd sub nom., NLRB v. Armato,* 199 F.2d 800 (7th Cir. 1952); *Firchau Logging Co., Inc.*, 126 NLRB 1215, 1221 (1960); *Howard Johnson, Inc. of New Jersey,* 135 NLRB 1260, 1268 (1962), *enf'd,* 371 F.2d 1 (3d Cir. 1963), *cert. denied,* 375 U.S. 920. None of these cases is in point. Each

case involves a factual situation where the change in ownership occurred *within* the certification year. The Board, with this Court's approval, has uniformly held that during the first year of a union's certification, an employer must honor the Board's certification, but that after the certification year, the employer may refuse to bargain with the union if he has fair doubts about the union's continued majority. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

Under the contract bar doctrine, where a plant under a union contract moves a short distance and a considerable number of employees go along, the contract bars an election at the new location. The reason for this doctrine is that it is logical to assume that since the employees are the same both at the old and the new location, the employees' choice of bargaining representative and the contract negotiated by the bargaining representative will remain the same. If, however, a considerable proportion of the employees do not transfer to the new location, the Board refuses to apply its contract bar doctrine. *Edward Aaron Corp.*, 125 NLRB 840 (1959).

Petitioner cites two cases as authority for the proposition that the Board does not require that the old employees constitute a majority at the new location in order for the contract to bar an election. *Viewlex, Inc.*, 48 LRRM 1585 (1961) is a decision by a regional director—not the Board—and lacks precedential value. *Yale Rubber Mfg. Co.*, 85 NLRB 133 (1949) does not support the Union's position. In *Yale* the employer shut down its operations at the old location in February, 1949, and began full capacity operations at the new location in March, 1949. By the date of the Board hearing—April 13, 1949—the work force at the new location numbered 150, 96 of whom had been employed at the old location. On the basis of these facts showing that a majority had transferred, the Board refused to test the union's majority at the new location.

There is no conflict between the rules applied by the Board in contract bar and successorship cases and the recognition rule applied in the instant case. The fact of a change in business ownership or a change in plant location does not affect the status of the employee's bargaining representative *where the employees who selected that bargaining representative remain the same.* But where there is a substantial change in the employee complement so as to justify a reasonable doubt that the union has retained its majority status, the union is no longer entitled to recognition as a matter of right but is required to establish its majority status.

The rule in plant relocation cases that a union is entitled to automatic recognition at the new location only if employees transfer in sufficient numbers to preserve the union's majority is consistent with the basic principles of the Act and related Board doctrines, and a rule that should not be overturned by this Court.

Question No. 3

In its Question No. 3, Petitioner states that in bargaining over the transfer of employees to the new location, the Company "never once swerved from its position that the employees it considered lazy or guilty of misconduct would definitely not be rehired." (Pet., p. 23) Based on this factual premise, Petitioner argues that the Company in effect discharged these employees unilaterally without engaging in collective bargaining with the Union. (Pet., p. 22)

The fallacy in this contention by Petitioner is that the factual premise upon which Petitioner bases its legal argument is directly contrary to the facts in the case as found by the Board. Petitioner is in effect asking this Court for an advisory opinion based on a hypothetical fact situation.

During bargaining the Company agreed to bargain with the Union as to each individual on the Anderson seniority list for employment at Upland. (A. 29a, 34a) At a later point in bargaining, the Company proposed that an independent arbitrator be used to determine through objective standards which Anderson employees should be offered jobs at Upland. (A. 33a, 35a) These facts are undisputed. Petitioner's representation to this Court that the Company "never once swerved from its position that the employees it considered lazy or guilty of strike misconduct would definitely not be rehired" is simply not true.

The Board and the courts have long held that an employer is justified in refusing to reinstate or rehire employees who engage in strike misconduct. *Oneita Knitting Mills, Inc. v. NLRB,* 375 F.2d 385, 390 (4th Cir. 1967); *Rangaire Corp.,* 157 NLRB 682 (1966). Similarly, inefficiency, poor work, low production or loafing has been held sufficient justification for a refusal to rehire or reinstate. *Addison Shoe Corp.,* 151 NLRB 65 (1965); *Corbin-Dykes Electric Co.,* 141 NLRB 1198 (1963); *The Lane Construction Corp.,* 138 NLRB 1118 (1962).

The Company was under no obligation to guarantee the transfer of employees who engaged in strike misconduct or whose work performance was unsatisfactory at the old location. The Company satisfied its duty to bargain concerning the transfer of these employees by agreeing to bargain with the Union as to the employment rights of each of the employees in question, or, as an alternate, by agreeing to submit the issue of their employment rights at Upland to an independent arbitrator. There is no support in the record for Petitioner's contention that the Company in effect unilaterally discharged these employees without engaging in collective bargaining.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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